

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KAREN CALL,

Plaintiff,

v.

ROUTH CRABTREE OLSEN, P.S.,  
STEPHEN ROUTH, VALERIE I.  
HOLDER, LAUREN DAVIDSON  
HUMPHREYS, JANAYA L. CARTER,  
JENNIFER RUSSELL,

Defendants.

CASE NO. 13-5241 RJB

ORDER ON DEFENDANTS'  
MOTION TO DISMISS PURSUANT  
TO F.R.C.P. 12(B)(5) AND 12 (B)(6)

This matter comes before the Court on Defendants' Motion to Dismiss Pursuant to F.R.C.P. 12(b)(5) and 12(b)(6). Dkt. 6. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

On March 28, 2013, Plaintiff filed this case, pro se, asserting claims against Defendants for violations of the Fair Debt Collections Practices Act, "15 U.S.C. § 1692" ("FDCPA"), the Washington Fair Debt Collection Agency Act, "RCW 19.16.100" ("CAA") and the Washington Consumer Protection Act, "RCW 19.86" ("CPA") in connection with property located at 4309

1 Madrona Lane NW, Gig Harbor, Washington 98335. Dkt. 1. Plaintiff seeks damages and  
 2 injunctive relief. *Id.*

3 Defendants, including RCO Legal, P.S. (erroneously named as Routh Crabtree Olsen  
 4 P.S.) (“RCO”), and the individually named Defendants who are employees of RCO, now move  
 5 for dismissal of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the Complaint  
 6 fails to state a plausible claim of relief. Dkt. 6. Defendants argue that as a law firm retained by a  
 7 bank (which purchased the property at a foreclosure sale) to first give the tenants of the property  
 8 a notice to vacate and then, if they fail to vacate, to file a suit for unlawful detainer, they are not  
 9 “debt collectors” under the statutes at issue here. Defendants further argue that the Complaint  
 10 should be dismissed under 12(b)(5) for insufficient service of process because Plaintiff attempted  
 11 to effect service on them by mailing them a copy of the Summons and Complaint via U.S. mail.  
 12 *Id.* For the reasons stated below, the motion to dismiss should be granted.

### 13 I. FACTS AND PENDING MOTION

14 In reviewing a motion to dismiss for failure to state a claim, the court is generally limited to  
 15 review of “the face of the complaint, materials incorporated into the complaint by reference,”  
 16 and matters of which judicial notice may be taken. *In re Rigel Pharmaceuticals, Inc. Securities*  
 17 *Litigation*, 697 F.3d 869, 876 (9th Cir. 2012). “A court may take judicial notice of matters of  
 18 public record without converting a motion to dismiss into a motion for summary judgment, as  
 19 long as the facts noticed are not subject to reasonable dispute.” *Id.* (*internal quotations*  
 20 *omitted*).

#### 21 A. FACTS

22 On June 10, 2010, Deutsche Bank Trust Company Americas as Trustee for RALI (Series)  
 23 2006QA7 (“Deutsche Bank Trust”) was granted title to the real property situated at 4309  
 24

1 Madrona Lane Northwest, Gig Harbor, WA 98335 through a Trustee's Deed. Dkt. 6-1, at 1-3;  
2 Also found at <https://armsweb.co.pierce.wa.us/RealEstate/SearchEntry.aspx> under instrument  
3 number 201006110397. The Trustee's Deed was recorded with the Pierce County Washington  
4 Auditor's office on June 11, 2010 and the Court will take judicial notice of this document which  
5 is in the public records. *Id.* The Trustee's Deed indicates that it was made pursuant to powers  
6 conveyed in a Deed of Trust given by Rodney J. Gibson and Lisa K. Gibson on July 5, 2006. *Id.*

7 The Complaint alleges that on May 4, 2012, "an eviction notice from RCO was tacked onto  
8 Plaintiff's house demanding eviction in 14 days." Dkt. 1, at 3. The Complaint asserts that RCO  
9 claimed to represent "alleged creditor" Deutsche Bank Trust "demanding payment from some  
10 unknown account." *Id.*, at 4. This Notice to Vacate, attached to the Motion to Dismiss by  
11 Defendants, is addressed to "all Tenants of Rodney J. Gibson" and concerns property at 4309  
12 Madrona Lane Northwest, in Gig Harbor, Washington 98335. Dkt. 6-2, at 1-3. The Notice to  
13 Vacate informs "tenants or subtenants" that they must vacate the property within a set period of  
14 time (60 days, 90 days, etc.), depending on when they entered into their rental agreement. *Id.*

15 Plaintiff maintains in her Complaint that she has "no contractual obligation to pay  
16 Defendants." *Id.* Plaintiff claims in her Complaint that she sent Defendants three "Demand[s]  
17 for Proof of Claim and a Notice of Dispute." *Id.* In the first, dated May 21, 2012, which is  
18 attached to the Complaint, Plaintiff claims to be the "authorized secured party creditor" and is  
19 "authorized to act full in all financial matters regarding this property." *Id.*, at 13. She demands  
20 to see a copy of the original mortgage note, deed of trust, or contract and an assignment from the  
21 alleged creditor, a copy of the Defendants' bond and license to practice law, among other items.  
22 *Id.* Attached to the Complaint is another letter Plaintiff purportedly sent to Defendants on  
23 August 7, 2012. *Id.*, at 15. She again demands a "verified copy of the original mortgage  
24

1 note/deed of trust/contract,” and verification of assignment from the alleged creditor. *Id.* She  
2 asserts that Defendants’ correspondence back to her, dated August 16, 2012, stated that “they  
3 were not obligated to respond.” *Id.* That August 16, 2012 letter is also attached to her  
4 Complaint. *Id.* In this attached letter, Defendants state that they represent Deutsche Bank Trust  
5 and that “on June 4, 2010, a foreclosure sale was conducted in accordance with RCW 61.24 *et*.  
6 *seq.*” Dkt. 1, at 17. The letter further states that to the extent that her letter of August 7, 2012, is  
7 a “request for admissions and productions, [their] office is not responding because the request  
8 does not comply with Court Rules 33 through 36.” *Id.*

9 Plaintiff also attaches a letter she sent to the Defendants, dated August 21, 2012, entitled  
10 “Notice of Intent to Sue.” *Id.*, at 18. In this letter, Plaintiff demands settlement for violations of  
11 federal and state law. *Id.*

12 On September 11, 2012, Deutsche Bank Trust filed an unlawful detainer action against  
13 Plaintiff (and all other occupants of the property) in Pierce County Washington Superior Court.  
14 Dkt. 6-3, at 1-16. Defendants are the attorneys and law firm that represent Deutsche Bank Trust  
15 in that case. *Id.* In the unlawful detainer action, Deutsche Bank Trust seeks restitution of the  
16 premises, fair rental value of the property until vacancy in an amount set by the Court, and  
17 attorneys’ fees and costs in the event the action is contested. *Id.*, at 7.

18 In Plaintiff’s Complaint here, she asserts that Defendants continued to attempt to collect a  
19 debt, without showing that they “had the right to collect on behalf of alleged creditor” or that  
20 Deutsche Bank Trust owned “the note.” Dkt. 1, at 4-5. She maintains that Defendants further  
21 violated federal and state law by continuing to attempt to collect a disputed debt prior to  
22 validation by: 1) filing a suit in the Superior Court of the State of Washington against her, and 2)  
23 “appearing at a pre-trial to evict.” *Id.*, at 5.

**B. PENDING MOTION**

In their Motion to Dismiss, Defendants argue that Plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process. Dkt. 6. Defendants argue that, pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff's FDCPA claim should be dismissed with prejudice and without leave to amend because Defendants are not "debt collectors" and their actions do not constitute "debt collection." *Id.* Defendants argue that Plaintiff's state law claim under CAA should be dismissed with prejudice and without leave to amend because attorneys are exempt from the definition of "debt collector." *Id.* Lastly, Defendants argue that Plaintiff's state law claim under the CPA should be dismissed because she has not alleged any facts to support her claim. *Id.*

**II. DISCUSSION**

**A. MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS**

"Rule 4 of the Federal Rules of Civil Procedure governs the commencement of an action and the service of process." *Employee Painters' Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993, 999 (9th Cir. 2007). Fed. R. Civ. P. 4(h)(e) provides that an individual may be served by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Under Washington law, service of process is to be made to the defendant personally, or "by leaving a copy of the summons at the house of his or her usual abode with some person of

1 suitable age and discretion then resident therein.” RCW 4.28.080(15). Washington law further  
 2 provides that:

3 (16) In lieu of service under subsection (15) of this section, where the person  
 4 cannot with reasonable diligence be served as described, the summons may be  
 5 served as provided in this subsection, and shall be deemed complete on the tenth  
 6 day after the required mailing: By leaving a copy at his or her usual mailing  
 7 address with a person of suitable age and discretion who is a resident, proprietor,  
 or agent thereof, and by thereafter mailing a copy by first-class mail, postage  
 prepaid, to the person to be served at his or her usual mailing address. For the  
 purposes of this subsection, “usual mailing address” does not include a United  
 States postal service post office box or the person's place of employment.

8 RCW 4.28.080(16). Further, under Fed. R. Civ. P. 4(h)(1), “unless federal law provides  
 9 otherwise, a domestic or foreign corporation, or a partnership or other unincorporated association  
 10 that is subject to suit under a common name,” and is in a judicial district of the United States  
 11 must be served:

12 (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or  
 13 (B) by delivering a copy of the summons and of the complaint to an officer, a  
 14 managing or general agent, or any other agent authorized by appointment or by  
 law to receive service of process and--if the agent is one authorized by statute and  
 the statute so requires--by also mailing a copy of each to the defendant; . . .

15 Once service is challenged, Plaintiff bears the burden of establishing that service was valid.

16 *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004).

17 Defendants’ Motion to Dismiss for insufficient service of process (Dkt. 6) should be  
 18 granted. Plaintiff has failed to show that she complied with the Fed. R. Civ. P. 4 as to either the  
 19 individual Defendants or the business entity. The summons and complaint were sent to the RCO  
 20 offices by U.S. mail and by facsimile transmission. Plaintiff’s Complaint should be dismissed  
 21 without prejudice on these grounds, although should be dismissed with prejudice on other  
 22 grounds as stated below.

23 **B. STANDARD FOR MOTION TO DISMISS FOR FAILURE TO STATE A**  
 24 **CLAIM**

1 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a  
 2 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
 3 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material allegations  
 4 are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*,  
 5 717 F.2d 1295 (9<sup>th</sup> Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss  
 6 does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his  
 7 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the  
 8 elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955,  
 9 1964-65 (2007)(internal citations omitted). "Factual allegations must be enough to raise a right  
 10 to relief above the speculative level, on the assumption that all the allegations in the complaint  
 11 are true (even if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a  
 12 claim to relief that is plausible on its face." *Id.* at 1974.

### 13 **C. FEDERAL LAW CLAIM – FDCPA**

14 The FDCPA applies to "debt collectors" as defined under the act. 15 U.S.C. § 1692a(6).  
 15 To be held liable for violation of the FDCPA, a defendant must fall within the Act's definition of  
 16 "debt collector." *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193, 1198 (C.D.Cal.2008)  
 17 (citing *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995)). A "debt collector" is "any person who uses  
 18 any instrumentality of interstate commerce or the mails in any business the principal purpose of  
 19 which is the collection of any debts, or who regularly collects or attempts to collect, directly or  
 20 indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The  
 21 FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money  
 22 arising out of a transaction in which the money, property, insurance, or services which are the  
 23  
 24

1 subject of the transaction are primarily for personal, family, or household purposes.” 15 U.S.C.  
2 § 1692a(5).

3 Plaintiff fails to show that Defendants’ actions constitute an attempt to collect a “debt”  
4 under the FDCPA. Defendants are lawyers and a law firm that represent Deutsche Bank Trust in  
5 its unlawful detainer action, brought under RCW 59.12, against Plaintiff. The unlawful detainer  
6 action was instituted after Deutsche Bank Trust acquired the property in a foreclosure sale and  
7 Plaintiff was given a notice to vacate pursuant to Washington law, RCW 61.24.146. RCW  
8 61.24.146(1) provides that:

9 A tenant or subtenant in possession of a residential real property at the time the  
10 property is sold in foreclosure must be given sixty days' written notice to vacate  
11 before the tenant or subtenant may be removed from the property as prescribed in  
chapter 59.12 RCW. Notwithstanding the notice requirement in this subsection, a  
tenant may be evicted for waste or nuisance in an unlawful detainer action under  
chapter 59.12 RCW.

12 Under Washington law, an unlawful detainer action is “a narrow one, limited to the question of  
13 possession and related issues such as restitution of the premises and rent.” *Munden v.*  
14 *Hazzelrigg*, 105 Wash.2d 39 (1985). The unlawful detainer action here is one that was instituted  
15 to gain possession of the property, not to collect a “debt” as defined under the FDCPA. It was  
16 not to collect on “any obligation or alleged obligation of a consumer to pay money arising out of  
17 a **transaction** in which the money, property, insurance, or services which are the subject of the  
18 transaction are primarily for personal, family, or household purposes.” 15 U.S.C. §  
19 1692a(5)(emphasis added). Plaintiff has failed to allege that she, Defendants, or Defendants’  
20 client Deutsche Bank Trust, ever entered into a “transaction.” Plaintiff has failed state a  
21 plausible claim for relief because the allegations she makes against Defendants to not establish  
22 that they are attempting to collect a “debt” as is defined under the FDCPA.  
23  
24



**D. STATE LAW CLAIM – CAA**

Washington's CAA regulates the collection of “any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.” *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 171-172 (Wash.App. Div. 1,2007). Under the CAA “collection agency” is: “[a]ny person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person.” RCW 19.16.100(2). CAA definition of “collection agency” excludes:

Any person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: Trust companies; savings and loan associations; . . . abstract companies doing an escrow business; . . . , persons acting under court order; **lawyers**; insurance companies; credit unions; loan or finance companies; mortgage banks; and banks;

RCW 19.16.100(3)(c)(*emphasis added*). Defendants are explicitly excluded from the definition of “collection agency” under the CAA. Plaintiff has not stated a claim under the CAA which would plausibly entitle her to relief. Her CAA claim should be dismissed.

**E. STATE LAW CLAIM – CPA**

Washington’s Consumer Protection Act prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. A Plaintiff must prove five elements to state a claim for a violation of the CPA: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986).

Plaintiff’s CPA claim should also be dismissed. First, Plaintiff has failed to allege any action by Defendants that amounts to an “unfair or deceptive act.”

As to the second element, the term “trade” as used in the CPA “includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.” *Michael v. Mosquera-Lacy*, 165 Wash.2d 595, 602-603 (2009). “In a legal practice entrepreneurial aspects include how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients.” *Id.*, at 603 (*internal quotation omitted*). “Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.” *Id.* Plaintiff makes no allegations regarding “the entrepreneurial aspects of the practice of law” that fall within the “trade or commerce” definition of the CPA.

As to the remaining CPA elements, Plaintiff has failed to allege an actionable “public interest impact” or that she suffered an injury which was caused by Defendants’ violation of the act. Plaintiff’s CPA claim should be dismissed.

#### **F. LEAVE TO AMEND**

Moreover, dismissal should be with prejudice and without leave to amend. In assessing whether a case should be dismissed with prejudice and without leave to amend, five factors should be considered: “(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint.” *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004)(citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995)). “Futility alone can justify the denial of a motion for leave to amend.” *Id.*

Amendment in this case would be futile. Plaintiff has failed to articulate any viable legal theories which would constitute a claim for relief against Defendants under federal law. Plaintiff has also failed to establish that her Washington law claims under the CPA or CAA are plausible. Accordingly, her case should be dismissed with prejudice and without leave to amend.

